No. 2661.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Bun Chew,
Appellant,
vs.
Charles T. Connell, as Immigration Inspector in Charge,
Appellee.

PETITION OF APPELLANT FOR A REHEARING.

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To the Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

The question of the limitation of the authority of the Secretary of Labor to deport under the Immigration Act being one of such vast importance, the appellant in the action named above hereby takes the liberty of respectfully asking the court to grant a rehearing in the matter and to reconsider some of the points of law involved.

We believe that the majority of the court in its opinion filed herein, in which the decision of the lower court was affirmed, erred in its statement of a very material legal doctrine.

THERE IS NO ANALOGY BETWEEN STATUTES OF LIMITATIONS IN CRIMINAL ACTIONS AND THE PROVISIONS IN QUESTION OF THE IMMIGRATION ACT.

The majority of the court adopted a view suggested by the attorney for the United States in his brief and said "the statute should be construed in analogy with statutes of limitation in criminal cases, the requirement of which is answered if prosecution is begun within the time limited." (Opinion filed May 1, 1916.)

No citation of authority was given to support this holding, nor is there any offered by the government in its brief. It is taken for granted that such an analogy exists, but an examination of the law will show a wide distinction between limitations of criminal actions and the restriction of the authority of the Secretary of Labor.

The Immigration Act, it will be remembered, provides that the secretary

> "shall cause such alien within a period of three years after landing or entry therein *to be taken into custody and returned to the country whence he came.*" (Sec. 21, Act of Feb. 20, 1907.)

To create the analogy suggested by the court we would have to find that the various statutes affecting the time in which criminals can be prosecuted read something like this:

> Criminal actions may be prosecuted and sentences executed within (say) three years after the commission of the act complained of.

Further than that, in order to justify the United States' attorney's statement and the court's holding,

we would have to find that the various courts had interpreted statutes similar to the supposititious one just given to mean that the mere institution of an action within the statutory period was sufficient compliance with the demand of the law.

But such is not the case. The courts have held that the commencement of an action during the time limit is all that is necessary, *because that is just what every law, which limits criminal prosecutions in the Union, says.*

The following are excerpts from the laws of all states wherein prosecutions are limited in point of time, only enough of each statute being given to show its relation to the point now argued:

"* * * unless an indictment is found, or the information is instituted within three years."

U. S. Rev. St., #1043.

"An indictment must be found or an information filed within three years * * *"

#800, California Penal Code.

"The prosecution of * * * must be commenced within * * *"

#7345, Code of Alabama.

"An indictment must be found for * * *, or an information filed within * * *"

#827, Penal Code of Arizona.

"* * * unless an indictment be found or prosecution instituted within * * *"

#2106, Code of Arkansas.

"* * * unless an indictment be found or unless the information or the complaint for the same shall have been filed within * * *"

#2076, Code of Colorado.

"No person shall be prosecuted * * *, except within five years, etc."

#1578, Code of Connecticut.

"* * * an indictment shall be made and presented within one year * * *"

Sec. 1, Chap. 83, Laws of Florida.

"An indictment must be found within * * *"

#7501, Code of Idaho.

"An indictment may be found within * * *"

#313, Dov. IV, Chap. 38, Laws of Illinois.

"* * * unless an indictment be found within * * *"

#1331, Code of Indian Territory.

"An indictment must be found within * * *"

#5164, Code of Iowa.

"Prosecutions must be commenced within * * *"

#5918, Code of Kansas;
#1138, Code of Kentucky.

"No indictment shall be found after * * *"

Sec. 15, Chap. 132, Laws of Maine.

"No prosecution or suit shall be commenced unless within * * *"

#11, Art. LVII, Laws of Maryland.

"All * * * indictments shall be found and filed within * * *"

Sec. 25, Chap. 213, Laws of Massachusetts;

#15063, Howell's Michigan Statutes.

"An indictment cannot be found except * * * within * * *"

#6744, Statutes of Minnesota.

"A person shall not be prosecuted for any offense, unless the prosecution commence within * * *"

#1414, Code of Mississippi of 1906.

"* * * unless an indictment be found or information filed within * * *"

#4945, Rev. St. Missouri.

"* * * an indictment for * * * must be found or information filed within * * *"

#1581, Crim. Code of Montana.

"* * * unless the indictment, information or action for the same shall be found or instituted within * * *"

#8910, Rev. St. Nebraska.

"Indictments or informations for offenses shall be found or instituted within * * *"

Sec. 14, Chap. 253, Rev. St. New Hampshire.

"* * * unless an indictment be found or information filed therefore as hereinafter limited * * *"

#3368, New Mexico Statutes.

"That all actions or informations shall be brought or exhibited within * * *"

Sec. 21, Comp. Sts. of New Jersey.

"An indictment must be found within * * *"

#142, Code of Crim. Proc. of New York.

"* * * shall be presented and found by the grand jury within * * *"

#3147, Revisal of 1905, Laws of North Carolina.

"An information must be filed or an indictment found within * * *"

#9685, Code of Crim. Proc., Rev. Codes of North Dakota.

"* * * on complaint made within * * * thereafter * * * shall be fined and imprisoned * * *"

#13044, P. & A., Ohio General Laws.

"* * * prosecution must be commenced within * * *"

#1376, Oregon Laws.

"* * * unless an indictment be found against him therefore within * * *"

Sec. 33, Chap. 354, Gen. Laws of Rhode Island.

"An indictment or information shall be filed within * * *"

#86, Chap. 2, Comp. Laws South Dakota.

"* * * prosecution must be commenced within * * *"

#5625, Rev. Laws of Oklahoma.

"Prosecutions * * * shall be commenced within * * *"

#5810, Code of Tennessee.

"An indictment may be presented within * * *"

Art. 216, Well's Texas Crim. Stats.

"An indictment must be found or information filed within * * *"

#4599, Comp. Laws of Utah.

"Actions, complaints, informations or indictment * * * shall be commenced within * * *"

#2347, Pub. Stats. Vermont.

"An indictment or information must be found or filed within * * *"

#4629, Wisconsin Stats.

(With the means of search available no statutes of limitations were found for Delaware, Georgia, Hawaii, Indiana, Louisiana and South Carolina.)

It must therefore be admitted that the legislative intent as signified by the wording of the various statutes given above was different from that of Congress when the Immigration Act was passed. In all these laws it is obvious that the commencement of an action should toll the statutes, for that is precisely what each and every one of them says. None of them are analogous to Sec. 21 of the Act of Feb. 20, 1907.

Further than this, such statutes of limitations are not loosely construed as intimated by the court in its

opinion. It may not "seem reasonable to suppose that Congress intended that before ordering the arrest of an alien believed to be unlawfully in the country the secretary must take into account the probable time that must ensue between the arrest and the warrant of deportation, and compute the time of all possible delays to be caused by appeals or writs of *habeas corpus,*" as said in the majority opinion, but the rule of reason should have been applied by Congress before the act became a law. In the case at bar the alien took no action which would have interfered with the lawful exercise of the secretary's power. The three years ran before his petition for a writ of *habeas corpus* was filed. But even if they had not, the power of the secretary would have lapsed. As the Supreme Court says in M'Civer v. Regan, 4 L. Ed. 179, in construing a civil statute:

> "If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not contain. It has never been determined that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, *though created by the legislature,* shall take such case out of the operation of the statute of limitations, unless the legislature has so declared its will."

It may be that Congress has realized its "error" for the Immigration Act now before Congress increases the term of the secretary's autocratic power to five years.

The state courts have interpreted their statutes in a light favorable to the accused, and have held that the letter of the law must be complied with.

> "Under Crim. Code #256, which provides that the indictment for an offense must be found within three years next after the offense was committed, the running of the statute is not arrested by the filing of a complaint before a magistrate and causing the accused to be arrested and bound over to the District Court."
>
> State v. Robertson, 75 N. W. 37 (Neb.).

> "To 'commence' a criminal action to prevent the statute of limitations from running there must not only be a complaint on oath, but a warrant of arrest must be signed and placed in the hands of the officer for service."
>
> People v. Clement, 40 N. W. 190 (Mich.).

> "The finding of an informal presentment is not the finding or institution of an indictment, so as to take the case out of the Act of April 30, 1790, limiting the prosecution of certain offenses to two years."
>
> U. S. v. Slacum, Fed. Cas. No. 16311, 1 Cranch. 485.

There is a very great deal of case law to the same effect, but we have found none that could substantiate the statement of the attorneys for the United States in their brief. Consequently, it must appear that the majority of the court's holding cannot be sustained on any inference drawn from the construction of criminal statutes of limitation. If an analogy is to be made—and we are anxious that one should be—the true con-

clusion is that Congress meant exactly what it said, viz., that the alien should be taken into custody and deported within three years after entry.

Our Contention That There Was No Evidence to Authorize Deportation Did Not Rest Solely Upon the Proposition That the Appellant Was in Possession of a Certificate of Residence.

In its opinion the majority of the court stated that it was "shown by the evidence that the appellant had left the United States and gone to Mexico," but no comment was made on the proof of that fact, which we had attacked very earnestly in our brief. From this we feel that it is possible that the court misconstrued the stipulation filed by the attorneys herein, which is presented in full in the government's brief, as an agreement waiving the point of the sufficiency of the evidence. The stipulation was, however, only to the effect that the statements of Breton and Garcia [pages 45 and 46 of the transcript]
"were read to the alien * * * and that the alien Bun Chew, himself, identified the pictures attached to the statements upon pages 10 and 11 of the transcript as his photograph."

The stipulation did not affect the question of the power of the secretary to deport on nothing more than two unverified statements, such as were used in this case, when supported by nothing else, and, as such statements have been used in other cases and undoubtedly will be brought into use again, it is of great im-

portance, both to the government and the bar, that an expression of the opinion of this court on the question be obtained as soon as possible. This is especially true now, inasmuch as the lower court in this case expressly held such proof sufficient while Judge Dooling of the Northern District of California in a very recent case decided to the contrary, saying:

> "I have had occasion to hold before this that the fact which gives jurisdiction to the immigration officers to hear and determine these matters—that is, entry into the United States within three years —cannot be established by *ex parte* statements of witnesses in Mexico, who base their statements upon photographs, and are never confronted by the alien sought to be deported. In the absence of fair proof of such entry within three years, the only tribunals that can order the deportation of a Chinese laborer are the commissioners and the courts. I think the right of a laborer who has been long in this country to remain here is too important a right to be taken from him upon the *ex parte* statement of a resident of a foreign country who is never produced before him."
>
> *Ex parte* Tom Yuen, 230 Fed. 656.

It is to be noted that Judge Dooling emphasizes the fact that the proceeding is brought under the Immigration Act and not under the Chinese Exclusion Act, which expressly puts the burden of proof on a Chinaman charged with being unlawfully within this country. In the case at bar likewise only a violation of the Immigration Act is charged in the warrant of arrest and the application for warrant [page 34 of transcript], and for that reason Bun Chew is to be

considered only as an alien—just as an Englishman or a Frenchman might be—and not as a Chinaman. In view of this we believe that, owing to our failure to emphasize the point in our brief (although it is admitted on page 18 of the United States' attorneys brief), this court did not realize that deportation was sought here solely under the Immigration Act. Otherwise, we are sure it would not have said

"the burden rests upon the alien to show that his entry was legal, *since the burden is always upon him to show his right to be and remain in the United States,*"

for such *dictum* is contrary to previous expressions of this court, when interpreting the immigration law. The department has always been compelled to prove its charges by some evidence.

In fact Bun Chew could not be deported in a proceeding such as this for a violation of the Chinese Exclusion Law. The immigration officers have no authority to enforce its provisions, as has been clearly, logically and convincingly shown in *Ex parte* Woo Jan. 228 Fed. 928.

In that case the court analyzes all present and past statutes affecting immigration and Chinese exclusion and arrives at the unanswerable conclusion that the Chinese are entitled to a judicial hearing before a commissioner or court, when charged with not being properly in this country by virtue of the laws regulating the admission and residence of their people. This entire opinion, which has been followed in U. S. v. Prentiss, 230 Fed. 935, is respectfully called to the court's attention.

For the foregoing reasons, namely:

1. That if Sec. 21 of the Act approved Feb. 20, 1907, is to be construed in analogy with criminal statutes of limitation, the conclusion reached by the majority of this court is clearly erroneous, and

2. That the court was apparently misinformed as to the law claimed to have been violated by the alien, we respectfully ask that a rehearing be granted and the case be reconsidered on the grounds herein specified, or that the questions of law be certified to the Supreme Court.

FRANK STEWART,
J. W. HOWELL,
Attorneys for Appellant.

CERTIFICATE.

J. W. Howell hereby certifies that he is one of the attorneys for the appellant in the above mentioned matter; that in his judgment the foregoing petition for a rehearing is well founded and that it is not interposed for the purpose of delay.

J. W. Howell